

Systematic and Contractual Protection of the Commercial Establishment in the Saudi Legal System

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Abstract

Although the Saudi Commercial Court Law does not specifically regulate commercial assets, the Saudi legislator has addressed the protection of such assets through the Competition Protection Law issued by Royal Decree No. 75 of the year 1440 AH. This law aims to protect merchants from any unfair competition that may affect their capital, or in other words, their commercial assets. In commercial jurisprudence, these assets are referred to as the "commercial establishment" or "store," which comprises both tangible and intangible movable assets owned by the merchant as a single unit. Moreover, there exists an alternative method of protecting the commercial establishment beyond the statutory framework, namely, the protection provided through contractual agreements. Merchants may include clauses in their contracts that prohibit competition that harms them, commonly referred to as "prohibited competition." Thus, there are two types of protection for the commercial establishment: the first is protection from unfair competition, regulated by law, and the second is protection from prohibited competition, regulated by contractual clauses.

Keywords: *Commercial Assets, Protection of The Commercial Establishment, Nature of the Commercial Establishment, Unfair Competition, Prohibited Competition, Tangible and Intangible Movables.*

Introduction

Commercial law focuses on commercial transactions and addresses a specific group of individuals, whether they are natural or legal persons, who are merchants.

Commercial law is considered one of the most important branches of private law, preceded by civil law, which is a more general system compared to commercial law. In fact, civil law serves as the general framework for the rules of commercial law.

While commercial law primarily targets merchants, it also governs commercial activities. Commercial jurisprudence distinguishes between commercial and civil acts based on criteria that align with the spirit of the law.

The Commercial Court Law is the foundational system for many other commercial regulations in the Kingdom of Saudi Arabia, such as the Maritime Commercial Law, the Civil Aviation Law, the Trademark Law, the Companies Law, the Commercial Paper Law, the Bankruptcy Law, the Competition Protection Law, and several other evolving systems that are increasingly developing in the Kingdom. This is a natural result of the growth of commerce globally.

As previously mentioned, the Commercial Court Law primarily governs commercial activities, merchants, and certain other topics. However, it does not address a crucial subject: the commercial establishment or commercial assets. Although the Saudi legislator has enacted a system for its protection, namely, the Competition Protection Law, there remains a regulatory gap in the Commercial Court Law concerning the commercial establishment or commercial assets.

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Thus, while there is a system in place to protect legitimate competition that also falls under the protection of the commercial establishment or commercial assets, this system exists despite the regulatory vacuum in the Saudi Commercial Court Law.

Given the existence of a legal framework for the protection of the commercial establishment, this can be considered as an acknowledgment of its presence in the commercial life of the Kingdom of Saudi Arabia. However, in our opinion, the legal system alone is not sufficient to safeguard the commercial establishment. Alongside the system, the principle of autonomy of will, embodied in the doctrine of "pacta sunt servanda" (the contract is the law between the parties), also plays a key role. This protection is achieved through what we call "protection from prohibited competition."

Accordingly, this research will first provide a definition of the commercial establishment, in order to discuss how it can be protected by law from unfair competition and contractually from prohibited competition, and then explore the methods of protecting the commercial establishment.

Research Significance

The significance of this research lies in addressing the methods of protecting the commercial establishment, or commercial assets, either through legal systems or contractual means. These methods impose themselves on the commercial sphere concerning the commercial establishment, despite the absence of a formal regulatory framework for it in the Commercial Court Law.

Research Problem

The core of the research problem is the focus on the methods of protecting the commercial establishment, either through legal systems or through contractual mechanisms, despite the regulatory gap concerning the commercial establishment in the Commercial Court Law. This is highlighted through a descriptive and analytical approach by posing several questions:

What is the commercial establishment?

What are its components?

How is it protected by law?

And how is it protected contractually?

Research Objectives

The researcher aims to answer the questions posed in the research problem, focusing on explaining a legal phenomenon that has become a reality: the commercial establishment and the methods of protecting it.

Research Methodology

The methodology adopted in this research is the descriptive and analytical method.

Research Outline

The research outline is organized into two main chapters as follows:

Chapter One: The nature of the commercial establishment and its components.

Chapter Two: the legal methods of protecting the commercial establishment.

Conclusion (Findings and Recommendations).

Chapter One

The Nature of the Commercial Establishment and Its Components

Introduction and Division

The Saudi legislator has not addressed the commercial establishment within a legal framework in the Commercial Court Law, despite its importance being no less than that of commercial transactions and merchants. In this chapter, we will explore the concept of the commercial establishment, its legal nature, and its components. This will be divided into two topics as follows:

Topic One: The concept and legal nature of the commercial establishment.

Topic Two: The components of the commercial establishment.

Topic One

The Concept and Legal Nature of the Commercial Establishment

The term "commercial establishment" is synonymous with "store" or "commercial assets." Commercial assets refer to the assets that a merchant uses in conducting their trade, and they are distinguished by being all movable property, as real estate falls outside the scope of commercial law. The law views these components individually in a manner that differs from how it views them collectively; when combined, they form the commercial establishment or, in other words, the commercial assets.

The components, whether they are tangible or intangible movables, when viewed separately, are considered independent entities, each with its own material value, and some may even have their own specific legal regulations. When discussing the commercial establishment, we do not refer to any single component in isolation; rather, the term "commercial establishment" encompasses all these components collectively, through which the business activity is carried out as a unified whole.

A commercial establishment can be defined as a collection of tangible and intangible assets dedicated to conducting a commercial profession. This definition implies that any transaction concerning the commercial establishment does not apply to an individual component but to all the components that constitute the commercial establishment. This raises the question: what is the legal nature of the commercial establishment?

This issue is a subject of jurisprudential debate, and the reason for this debate lies in the unique legal rules governing it. First, as a collection of assets, it is governed by its own special rules, as it is considered intangible movable property, with rules that differ significantly from those that govern its individual components. Second, it comprises both tangible and intangible components, which do not lose their individual nature merely by being part of the merchant's assets. It is permissible to transact in some of these components individually without this being considered a transaction involving the entire commercial establishment. If a transaction involves the entire commercial establishment, legal procedures must be followed to transfer each component according to its nature in order to make the transaction enforceable against third parties. For this reason, jurists have divided into three schools of thought regarding the legal nature of the commercial establishment:

- The first school advocates the theory of an independent financial estate, also known as the legal entity theory. This theory posits that the commercial establishment constitutes a separate financial estate, distinct from the merchant's general assets, with its own liabilities and rights, independent of the merchant's other rights and obligations that are unrelated to the commercial establishment. This theory is not recognized in Egypt or France. However, in Germany, jurisprudence is largely settled on the notion that the commercial establishment is, in essence, a legal entity with its own separate financial estate.

- The second school of thought argues that the commercial establishment is not a separate legal entity with independent rights and obligations. Rather, it is a collection of practical or factual elements unified for the purpose of conducting commercial activities. This theory is referred to as the theory of factual or practical aggregation. As a result, there is no independent financial estate for the owner of the commercial establishment distinct from the establishment itself, nor is there a legal entity separate from the owner's general estate, as in the legal entity theory.

However, this theory is criticized because the term "factual aggregation" has no legal meaning. A collection of elements must be legally recognized, or it does not exist at all. Nevertheless, many French courts still adopt the idea of aggregation with regard to the components of a commercial establishment.

- The third school of thought introduced a new theory, viewing the commercial establishment as a form of intellectual property, similar to industrial property, from which rights arise. Proponents of the intellectual property theory argue that it explains the unification of the commercial establishment's tangible and intangible components and recognizes that the establishment is not merely a random accumulation of elements. Undoubtedly, this legal characterization is the most logical and avoids the criticisms directed at both the legal entity theory and the factual aggregation theory.

In general, jurisprudence tends to regard the commercial establishment as a special form of intellectual property concerning movable assets. This confirms that the commercial establishment has its own inherent financial value, distinct from the individual components that constitute it, making it a newly recognized form of wealth.

As the commercial establishment is considered intangible movable property, it is not subject to the ownership transfer procedures required for real estate. Moreover, the property in which the merchant conducts their business is not considered a component of the commercial establishment. As intangible movable property, the commercial establishment is not subject to the principle of possession of movable property in good faith as a basis for the ownership of the possessor.

Topic Two

The Components of the Commercial Establishment

As previously mentioned, when defining the commercial establishment, it is composed of both tangible and intangible elements. These elements together form the physical and intangible aspects of the establishment, which traders combine with the goal of attracting customers. In our view, the essence of the commercial establishment lies in the idea of attracting customers through the integration of these elements.

It is important to note that it is not sufficient for a commercial establishment to merely have its tangible and intangible elements; these elements must also be designated for commercial exploitation. In other words, the business activities must be carried out through the combination of the elements that make up the commercial establishment.

Moreover, the exploitation of the establishment must comply with the general legal framework of the state. It is not necessary for all the elements to be present in every commercial establishment, as the required components vary depending on the type of business. For instance, the office of a commission agent or broker may have only a small amount of equipment or tools necessary for its operation and may not include inventory. As such, a commercial establishment may do without tangible elements like goods and equipment, but it cannot function without intangible elements.

The tangible components of a commercial establishment consist of goods and equipment. Goods may include products intended for sale or raw materials necessary for the merchant's business operations, and the value of these components is subject to change over time.

The intangible elements, also known as non-material components, include customer relations, goodwill, the trade name, inventive names, trademarks, patents, industrial designs and models, lease rights, intellectual property rights, know-how, and licenses. These intangible elements are enumerated in Article 34/2 of Egyptian Commercial Law No. 17 of 1999. These are not an exhaustive list, but we will briefly define the most important components.

First: Trade Name

The Saudi legislator has not defined the trade name in the Commercial Names Law, but it is understood as the name a merchant adopts for their commercial establishment to distinguish it from other establishments.

Second Lease Rights

This component pertains to the merchant who leases a property where they conduct their business activities. It arises from the lease relationship between the landlord and the tenant, and it is considered part of the commercial establishment as it provides the legal basis for the merchant to operate their business on the leased premises. It also legally reflects the location of the commercial establishment.

Third Customer Relations and Goodwill

Customer relations refer to the clients who regularly frequent the establishment due to the quality of its products or its location. This does not give the merchants any proprietary rights over their customers, but it grants them rights against third parties who may try to divert these customers through unfair competition. Goodwill, on the other hand, is the ability of the establishment to attract occasional or passing customers due to its reputation.

Fourth: Inventive Naming

Inventive naming refers to catchy phrases that a merchant adopts to distinguish their commercial establishment from similar businesses. It differs from the trade name, as a merchant is required to have a trade name but is not obligated to have an inventive name. Additionally, an inventive name is not derived from the merchant's personal name, such as naming a store "The Green Salon."

Fifth: Trademarks

Article 1 of the Saudi Trademark Law No. 21 of 1423 AH defines a trademark as names in distinctive forms, signatures, words, letters, numbers, drawings, symbols, seals, embossed marks, or any other sign or combination of these that can be visually perceived and are suitable for distinguishing industrial, commercial, artisanal, or agricultural products, or forest exploitation or natural resources, or for indicating that the item on which the mark is placed belongs to the owner due to its manufacture, selection, invention, or trade, or to indicate the provision of a particular service.

We prefer to define a trademark as per the doctrine's concise and comprehensive definition: "Any sign or indication affixed to goods or services to distinguish them from other similar or identical goods and services."

To establish good faith in the use of a trademark, it must be used for commercial purposes to distinguish goods or services, not merely to retain the right to the mark for its own sake.

Sixth: Patents

According to Article 1 of the Saudi Patent Law, Integrated Circuit Layout Designs, Plant Varieties, and Industrial Designs No. 27 of 1425 AH, a patent is "a document granted to an inventor, allowing their invention to enjoy protection within the Kingdom of Saudi Arabia."

A patent is issued by an administrative decision of the competent authority, as stipulated in Article 2 of the same law. We disagree with those who consider a patent to be an administrative contract between the inventor and the public authority, whereby the authority grants the inventor exclusive protection to exploit their invention to meet public needs.

Seventh: Industrial Designs and Models

Industrial designs and models are defined as "any arrangement of lines or any three-dimensional form, with or without colors, used in industrial production by mechanical, manual, or chemical means." Industrial designs and models are used to enhance the aesthetic appearance of products. Examples of industrial designs include decorative lines and colors found on carpets, while industrial models refer to the external shape that products take, giving them a unique design.

Eighth: Exploitation Licenses and Industrial Licenses

This component refers to the merchant obtaining a license from the owner of a moral right or the owner of a trademark to exploit these rights, including technical knowledge. Technical knowledge is indispensable in operating and managing the licensed business, even though there is no independent legal system governing it. The elements of the commercial establishment mentioned in the definition are illustrative and not exhaustive.

Ninth: Literary and Artistic Property Rights

These are the rights granted to literary and artistic authors over their creative works. Literary and artistic property rights hold significant importance for certain types of businesses such as publishing houses, theaters, cinemas, and music venues.

Tenth: Trade Secrets

A trade secret is an intangible component of a commercial establishment and falls under the category of intellectual property. It is defined as a formula, pattern, compilation, or device, or a set of information used in business operations that provides the business owner with an advantage over competitors who do not know or use those secrets.

Chapter Two

Legal Methods of Protection for the Commercial Establishment

Introduction and Division

It is established that there are no specific legal provisions in the Saudi Commercial Court Law that protect the commercial establishment as a unified entity. However, there are specific provisions for protecting some of its elements, such as the legal protections for patents, trademarks, and others.

Nevertheless, the Saudi legislator enacted the Competition Law No. 75 of 1440 AH, in line with the economic policy based on the principle of competition adopted by the Kingdom of Saudi Arabia and the ongoing economic developments. This law can be utilized by the owner of a commercial establishment to protect it. Additionally, the owner may resort to contractual clauses in case there is a contract between them and another party, such as a contract for the sale of the commercial establishment.

Thus, the methods of protecting the commercial establishment can either be through the legal system or through contracts. Based on this, this chapter is divided into two topics:

Topic One: Protection of the Commercial Establishment through the Legal System.

Topic Two: Protection of the Commercial Establishment through Contracts.

Topic One

Protection of the Commercial Establishment through the Legal System

It is unsurprising that a merchant would seek to protect their commercial establishment through the Competition Law. Although this law provides protection for the commercial establishment, it is not a specialized system with specific provisions related solely to the commercial establishment in the technical legal sense. Rather, it is a system aimed at promoting and safeguarding fair competition and preventing monopolistic practices that do not lead to improving the market environment or fostering economic growth.

The law clearly outlines prohibitions that, if a merchant avoids them, will help achieve the law's objectives. Its provisions are straightforward, without ambiguity, and all constitute mandatory rules that cannot be overridden by agreements. Additionally, the law stipulates penalties for violations of its provisions.

Moreover, any individual, whether a natural or legal person, who suffers harm resulting from practices contrary to the law may seek compensation by filing a claim with the competent court, as provided in Article 25 of the same law.

Therefore, any natural or legal person who commits any of the prohibited acts set out in the law is considered to be harming the merchant's commercial establishment on a narrow scale and harming the state's economic system on a broader scale. In return, the state is entitled to enforce its rights through the prescribed penalties, while the merchant, on a personal level, may seek compensation through the competent court. The legislator has not specified the name of this type of claim or whether there is a particular procedural method for filing a compensation claim related to it.

We believe that this type of claim is called an "unfair competition claim," which is a compensation claim for damages suffered by the merchant in their commercial establishment due to unfair competition. However, the merchant must prove the fault, the damage, and the causal link between the fault and the damage.

As for the procedural method, we do not believe that there is a specific procedural requirement, such as presenting the case to a quasi-judicial committee as is the case, for instance, in banking disputes. We believe that this claim should be filed before the commercial court, as there is no specific provision stating otherwise.

Undoubtedly, legal protection in any field is pointless without being accompanied by clearly defined procedural safeguards. What practical benefit would there be in enacting national laws or regulations if the necessary procedural rules to activate such protection are not in place?

The primary role and strongest motivation for the existence of procedural law lies in ensuring the activation of legal protection for rights and legal positions when automatic enforcement fails. We had hoped that the legislator would clarify whether an unfair competition claim is to be filed through a specific procedure or not.

In another context, commercial law classifies types of unfair competition into three categories of actions as follows:

Actions leading to confusion and misrepresentation: These are acts that cause confusion about the merchants or their products, resulting in customers being diverted from the commercial establishment to the establishment of the merchant committing the acts.

Actions aimed at discrediting the competitor: These actions are intended to divert customers from the merchant's competitor by providing false information about the competitor or their products, leading to their discredit.

Actions causing disruption in the competing business: These include actions aimed at obtaining the competitor's trade secrets or inciting workers to strike or leave their jobs.

Topic Two

Protection of the Commercial Establishment through Contract

The aim here is to protect the commercial establishment based on the agreement between the contracting parties. For example, the seller may be obligated not to compete with the buyer by engaging in a similar trade within the scope of the sold establishment's activity. This is because such competition could divert customers from the sold establishment, thereby reducing its value as assessed at the time of the sale and affecting the number of customers frequenting the establishment.

In this context, the protection is a direct application of the principle of "pacta sunt servanda" (the contract is the law between the parties)," which mandates that the contracting parties must not alter or breach the contract except by mutual agreement or as provided by law. This principle also implies that the parties must perform the contract as stipulated, in a manner consistent with good faith, which is the foundation of transactions. Good faith requires that the parties execute the contract in a way that upholds integrity and fairness. If the contract is not executed in accordance with good faith, the merchant who fails to comply may be deemed to have engaged in prohibited competition under the terms of the breached contract.

This form of protection represents the legal embodiment of adopting the principles of free economic systems based on market mechanisms and upholding the principle of contractual freedom. While commercial interests aim to achieve profit and expand business activities, achieving these goals depends on the merchant's ability to compete with other enterprises, thereby ensuring the principle of survival of the fittest according to the requirements of good faith. Additionally, fostering economic freedom by upholding the principle of contractual freedom means restoring trust in merchants and their abilities to achieve and protect their interests. The economic interest remains paramount for businesspeople and economic ventures, regardless of their legal form.

The implication is that if the contract related to the commercial establishment is not executed in accordance with the behavior required by good faith, contractual liability arises, necessitating compensation for the injured party if they can prove fault, damage, and the causal link between the fault and the damage. A notable example of failing to adhere to good faith in the context of prohibited competition includes breaching exclusivity clauses in commercial agency, distribution, or representation contracts, which require one party to exclusively represent another party in a specific territory or geographical area and to distribute or promote the products of the first party exclusively.

Conclusion

By the grace of Allah, this research has been completed. We pray that it has been successful and beneficial, as He is the one who grants success and is capable of all things. The research has led to several findings and recommendations:

Findings

The commercial establishment is not specifically addressed in Saudi law, particularly in the Commercial Court system.

A commercial establishment consists of tangible and intangible assets that a trader utilizes in their business activities.

The legal nature of a commercial establishment is considered intellectual property, representing a modern form of wealth.

A commercial establishment is movable, but it is not subject to the principle of possession in good faith applicable to movable property.

The elements of a commercial establishment must be dedicated to the service of the commercial enterprise.

Not all elements need to be present for a commercial establishment to exist; the necessary elements vary depending on the type of trade.

While a commercial establishment may forgo tangible elements, it cannot forgo intangible elements.

The protection of a commercial establishment can be achieved through regulatory means, specifically the competition system, either through penalties prescribed by the system or by seeking compensation through claims of unfair competition, which are based on tort liability.

Forms of unfair competition recognized by commercial law include actions that cause confusion or misrepresentation regarding the trader or their products, actions aimed at discrediting competitors, and actions causing disruption in the competitor's business.

Protection of a commercial establishment through contracts, in accordance with the principle of "pacta sunt servanda" (the contract is the law between the parties), mandates the execution of the contract in good faith, which is termed protection against prohibited competition.

Protection of a commercial establishment through contracts represents the legal adoption of free economic system principles based on market mechanisms and upholding the principle of contractual freedom.

Violating exclusivity clauses is considered a prohibited form of competition as it constitutes a breach of contractual obligation.

Recommendations

We recommend establishing a modern system to replace the Commercial Court system, which should include specific provisions addressing commercial establishments and special protective measures. It would be beneficial to consider Egyptian legislation in this regard, as it is more developed on this subject.

We recommend that Saudi legal scholars address this topic in their scholarly work, as resources on this subject are scarce.

We advise Saudi lawyers and judges to consider that a commercial establishment forms a unified economic entity with greater value than its individual components. This entity constitutes the assets of traders, whether individuals or legal entities.

We also recommend that Saudi lawyers and judges carefully distinguish whether disputes related to a commercial establishment fall under unfair competition as per the system or prohibited competition due to a breach of contractual obligations, as each has different procedural paths.

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